

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2027

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2027

ALBERT MASCOLO,

Appellant

-vs-

UNITED STATES OF AMERICA,

Appellee

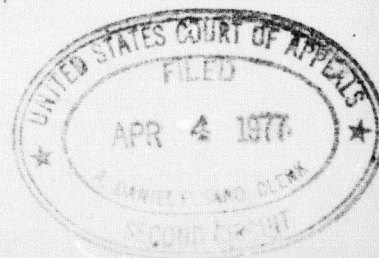
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

John R. Bartels, J.

APPENDIX

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DIST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	OTHER	NUMBER	DEM.	YR.	NO.
76C	76	824	05	05	76	3	0711X			
PLAINTIFFS						DEFENDANTS				

APPEAL

BARTELS,

MASCOLO, ALBERT
ALBERT MASCOLO

U.S.A.
THE UNITED STATES OF AMERICA

CAUSE

28 USC 2255 motion to vacate, correct, or set aside sentence
RELATED CASE: 72 CR 1220

ATTORNEYS

For PLNTFF:
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☐ CHECK HERE IF CASE WAS FILED IN FORM	DATE	FILING FEES PAID RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARD CARD	DATE MAIL
				JS6	

76C 824

MASCOLO vs USA

DATE	NR.	PROCEEDINGS
5-5-76		Motion for leave to proceed in forma pauperis (prisoner-petitioner) filed. (1) (cg)
5-5-76		Motion to vacate, etc. sentence filed. (2) (cg)
5-5-76		Memorandum in support of Motion to vacate, etc. , sentence filed. (3) (c)
5-8-76		By BARTELS, J.--ORDER TO SHOW CAUSE dtd 5-7-76 filed. U.S. Atty to file a return within ten days of receipt of the order. (4)
5-10-76		Copies of OSC & petition mailed to U.S. Atty. Copy of order mailed to plfff's atty.
5-17-76		Government's Memorandum in Opposition to Petitioner's Request for Writ of Habeas Corpus filed. (5)
6-11-76		Reply memorandum in support of motion to vacate sentence filed. (6)
12-2-76		By BARTELS, J.-- Same and order denying motion to vacate sentence filed. (7)
12-10-76		JUDGMENT that petitioner take nothing of the respondent & that the motion is denied filed. (8)
2-4-77		Affidavit in support of motion to proceed on appeal in forma pauperis filed. (9)
2-4-77		Notice of appeal filed. Copy w/docket to C of A. (10)
3-7-77		By BARTELS, J.--Motion for permission to proceed on appeal in forma pauperis dtd 3-5-77 filed. C of A notified. (11)
3/10/77		By BARTELS, J.--Scheduling order from court of appeals ordering the record on appeal be filed on or before 3/15/77 filed. (12)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

ALBERT MASCOLO,	:	
	:	
Petitioner,	:	
	:	
v.	:	76-C-824
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

-----x

BARTELS, District Judge

MEMORANDUM-DECISION and ORDER

This is a motion under 28 U.S.C. §2255 to vacate, correct or set aside a sentence imposed on Albert Mascolo on the ground that this court, in setting sentence, relied on errors of constitutional magnitude contained in the pre-sentence report. Mascolo was sentenced to a term of five years of incarceration and seven years of special parole on June 8, 1972, after a jury returned a verdict of guilty of conspiracy to sell heroin and unlawful possession of heroin. Incarcerated at the time this motion was made, Mascolo is presently out on parole.

To begin with, it must be pointed out that this court tried Mascolo's case and heard all the evidence, including

the testimony of both Epifania and Mascolo. In this case it did not need to and actually did not rely on any prejudicial statements in the presentence report which did not come out at trial, although it naturally read the presentence report. The offense was sufficient in itself to more than justify the sentence imposed, and while this would ordinarily be sufficient to dispose of the matter, see Ferranto v. United States, 507 F.2d 408 (2d Cir. 1974), the court will also deal with the contentions raised by petitioner.

According to the presentence report, Mascolo was a high-level courier of heroin for Epifania. McMillan and McMillan's nephew Weider were mid-level dealers in heroin; McMillan had been purchasing heroin from Greco but, because of a tight market, turned to Weider and Epifania for his supplies. Epifania and Greco were believed to have been partners in large-scale narcotics transactions. Both McMillan and, after his arrest, Weider became government informants. Weider's services led to the arrest of Mascolo on October 25, 1972.

On October 29, 1972, according to the report, Weider met with Epifania at the latter's request.

"During their conversation, which centered on the narcotics investigation in progress, Epifania reportedly indicated that he knew that 'Al' Mascolo was not an informer since 'Al' had performed two 'hit' jobs for him, whereupon Epifania gestered [sic] with his index finger as if pulling a trigger. The latter then allegedly cautioned Wieder that if he ever found that Wieder was the informer he would have him killed." Presentence Report at 8.

The statement again appears in the report in the discussion of Mascolo's participation in the crime:

"In addition, according to Wieder, Epifania at one time advised him that the defendant killed two people on Epifania's orders." Id. at 10. It is repeated near the end of the report: "According to Wieder, the defendant has also reportedly murdered two individuals on instructions from Epifania." Id. at 13.

The presentence report also contains the following:

"Prosecution against Michael 'Big Mike' Greco was abruptly halted in March 1973 when his dismembered body was delivered from Boston, Massachusetts and deposited at an undisclosed location in New York City by as yet unknown individuals. The investigation of events surrounding his death continues." Id. at 9.

The final statement of which petitioner complains is his own:

"[The defendant] further advises that at the time that Johnson was killed in connection with the attempted murder of Joseph Colombo, he was questioned by local police as a suspect. He advises, however, that he had a verifiable alibi and that the inquiry was not pursued in his direction." Id. at 11.

Mascolo states that he learned of the inclusion of these statements in the presentence report when he brought suit to protest his treatment at prison. See Mascolo v. Norton, 405 F.Supp. 523 (D.Conn. 1975). He asserts that he never killed anyone and that the presentence report unfairly implies that he was involved in the deaths of Greco and Johnson. In support of his motion, petitioner offers no affidavits but instead relies on the opinion of the court in Mascolo v. Norton, supra, which dealt with an entirely different question, i.e., the treatment of Mascolo by the prison authorities, and a letter by the Assistant United States Attorney in that case. Neither the opinion nor the letter shows in what respect the statements in the presentence report were false. Petitioner admits that he was questioned about the death of Johnson and that he knew Greco for many years, and neither admits nor denies the accuracy of the statement about Greco's death. It is proper to note also that Mascolo admitted at a bail hearing that he had

threatened to kill an agent on July 26, 1973. Transcript of Bail Hearing, August 3, 1973, pp. 4-5. What the prison authorities relied upon has no relation to what the court relied upon. At all events, to jump to the conclusion that reliance of the court upon the presentence report was the same as the reliance of the prison authorities upon that report is wholly unjustified.

In Townsend v. Burke, 334 U.S. 736 (1948), the Supreme Court held that to pronounce sentence on the basis of an extensive and materially false conception of defendant's record which defendant had no opportunity to correct by services of counsel was a violation of due process. In the case at bar, sentence was pronounced on the basis of the guilty verdict of a serious offense and not upon any false conceptions of the defendant's record, which under the circumstances were completely immaterial to the court's determination of punishment. Additionally, an examination of the record clearly indicates that the petitioner enjoyed effective assistance of counsel at sentencing.

I

At the hearing, counsel for Mascolo was given

adequate opportunity to examine the presentence report and to raise whatever issues he thought important. The case is thus unlike United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974), where counsel was denied a continuance in order to examine a lengthy sentencing memorandum prepared by the government, or United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970), where counsel was unable to effectively communicate his objections to the court. Here counsel read the report and took active issue with its description of Mascolo as a "high level" courier. When he stated he had finished, he was even offered more time by the court "to make such appeals as [he] wish[ed]." Sentencing Transcript, p. 7.

Counsel for Mascolo argues that his former counsel's failure to raise the points discussed in the present petition at the sentencing hearing shows in itself that his representation was ineffective, citing United States ex rel. Jackson v. Myers, 374 F.2d 707 (3d Cir. 1967). In view of the extensive discussion with Mascolo's former counsel at trial as to the admissibility of Weider's testimony that Epifania had told him Mascolo had performed two "hit" jobs for

^{1/}Epifania, this argument is ridiculous. See Record at 148-53, 268-69. We believe that Mascolo's former counsel was silent on all of these points because he, like the court, realized their utter immateriality to the sentencing process under the circumstances. At any rate, counsel had an opportunity to raise these issues at the sentencing hearing, and there is no showing that he should have raised these issues or that his failure to do so in any way deprived Mascolo of due process. It is reckless and grossly unfair to accuse him of ineffective representation particularly since the present counsel for Mascolo is in no position to render such judgment.

II

Petitioner also fails to show that the statements were material to the sentencing process. An examination of the cases indicates that even where there is error in the sentencing report of almost per se constitutional magnitude, such as a misunderstanding of or error in defendant's prior criminal record, an otherwise legal sentence is open to

^{1/} The government decided not to offer this testimony at trial. Record at 268-69.

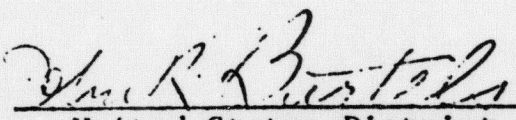
attack only if there has been explicit, demonstrable or otherwise clearly evidenced reliance on material and improper information. United States v. Tucker, 404 U.S. 493 (1972); Townsend v. Burke, supra; United States v. Malcolm, supra; Collins v. Buckhoe, 493 F.2d 343 (6th Cir. 1974); United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973); United States ex rel. Jackson v. Myers, supra. To argue that the court, as a matter of law and fact, is presumed to have placed material reliance on these statements merely because the court read the report is plain nonsense and underestimates in a gross and unwarranted fashion the ability of the court to analyze such statements and to take them for what they are worth. See United States v. Doyle, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965). The court was fully aware of the hearsay nature of the October 29 conversation between Epifania and Weider. Indeed, the court had stressed to the jury that "under no circumstances can a statement made by Mr. Epifania to Mr. Weider be in any way used against Mr. Mascolo because at that time the conspiracy had neded [sic]." Record at 272-73.

In closing, the court believes it is necessary to point out that the Yale law students and their supervising

attorneys who constitute the legal services organization representing Mr. Mascolo in this petition have evidently not taken the care to read the record in this case but instead have fabricated from their imagination factors which they would like to believe influenced the court in making its decision. Having fixed upon a desired punishment for Mascolo despite the seriousness of his offense, counsel for Mascolo have engaged in a process of faulty rationalization which in effect would substitute their judgment for the judgment of the court. Predicated upon this approach they cite a number of cases which indeed have no application to the facts of this proceeding. The court recognizes that this law school organization is probably very helpful in assisting prisoners in the New Haven area to properly present to the appropriate authorities legitimate claims of unjust sentences or unjust treatment suffered by such prisoners. Nevertheless, the members of this organization must act responsibly and respect the rights of others and not be blinded by their youthful zeal to correct non-existing and imaginary errors. The motion is denied.

SO ORDERED.

Dated: Brooklyn, N.Y.,
December 9, 1976.


United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ALBERT MASCOLO,

Defendant.

72 CR 1220

United States Courthouse
Brooklyn, New York

June 8, 1973
10:00 O'clock A.M.

B e f o r e :

HON. JOHN BARTELS, U.S.D.J.

CRIMINAL CAUSE FOR SENTENCE

GERALD I. METZ, C.S.R.
Official Court Reporter

APPEARANCES:

ROBERT DEL GROSSO, ESQ.,
Attorney for United States of America

HENRY DRESHER, ESQ.,
Attorney for Defendant

1
2 THE COURT: Mr. Mascolo, in imposing
3 sentence on you, do you have anything to say
4 in your behalf.

5 THE DEFENDANT: No.

6 MR. DRESHER: The answer is, "No."

7 THE COURT: Let him say.

8 Do you want Mr. Dresher to speak in
9 your behalf?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Now, Mr. Dresher, you
12 have had a chance to look at the probation
13 report. You were here at the trial. Before
14 I impose sentence, I should again repeat what
15 I told Mr. Roseman, that we had a conference
16 on this case and again independently and
17 before the conference, each conferee, except
18 one, reached practically the same sentence,
19 except with a little difference as to the
20 parole term. One of the conferees wanted to
21 increase the sentence beyond what I am about
22 to impose. I mention that so that you can
23 have that in mind when you wish to make the
24 remarks concerning mitigation of sentence.

25 MR. DRESHER: I am going to take

1
2 maximum five minutes or four minutes, so
3 I won't waste too much of your Honor's
4 time.

5 May I start off by saying --

6 THE COURT: Don't waste my time.

7 MR. DRESHER: I certainly won't.

8 There are certain things that I think should
9 be called to your Honor's attention here even
10 though we did go over the probation report,
11 and I'm sure your Honor gave it most serious
12 consideration.

13 THE COURT: I have. I knew it and
14 I also remember his testimony on the stand.
15 I know his background and I don't know that
16 you need add anything into it, but if you
17 wish, you may do so.

18 MR. DRESHER: I will only stress one
19 thing as to his background. You recall the
20 pathetic fact that actually he was in a
21 state of illiteracy. They fail in the
22 schooling system, and he was poorly prepared
23 to take his place in society. He has very
24 little conflict prior to this with the law,
25 and we all realize it's the family, his wife

1
2 and child, who suffer more than the defendant.

3 There is one thing I do say, and I
4 contradict and disagree with the probation
5 report that I read. Toward the end of that
6 report appears the language -- and everybody
7 concedes he was a courier, but the probation
8 report mentions the words, "A high level
9 courier."

10 I may say to your Honor in the
11 discovery proceedings pretrial, Mr. Sears
12 was there, who was the agent in charge, and
13 Mr. Del Grosso was present. At that point,
14 Mr. Sears told all of us -- and he used this
15 exact expression and it was a new one on
16 me. He said, "Oh, he was just a gofer." and
17 I suggest that should be put in the record,
18 g-o-f-e-r, meaning -- and he explained it to
19 us. He's the kind of guy that they send out
20 to get coffee and sandwiches and possibly
21 make a delivery, and his function was that
22 of a delivery boy, a menial -- he took no
23 real participation in any major profits or
24 in any of the activities of such transaction.

25 I don't consider that -- I think that's

1
2 an unfair statement, that he was a high
3 level courier. The very agent in charge --
4 and I think Mr. Del Grosso, he is a fair
5 man, will say he told us that, "Oh, his
6 position was that of a gofer, delivery boy."

7 Under the circumstances, sir, I
8 will ask your Honor to consider him as
9 such and remember this. Throughout this
10 trial and right through the probation report,
11 at all times he protested his innocence and
12 still does. However, we are bound by the
13 jury's verdict.

14 I may say to your Honor that our
15 whole theory, of course, of modern penology
16 is rehabilitation and a lengthy sentence
17 militates against that.

18 THE COURT: No, not the whole theory,
19 particularly in dealing with heroin and hard-
20 core drugs. The element of deterrent enters
21 into the sentence very strongly.

22 MR. DRESHER: I agree with that.

23 THE COURT: Society must be protected.
24 Always keep in mind that I have to keep
25 both in mind, both the defendant and society,

1
2 when I impose sentence. It's a difficult
3 problem. It's a serious one which I am sure
4 every judge would like to escape, but I
5 must do it and I will do it.

6 MR. DRESHER: I agree. I will say
7 this, of course. We should never deprive a
8 defendant or his family of the hope of being
9 restored to society and a lengthy sentence,
10 of course, militates against that.

11 Under the circumstances, sir, I have
12 nothing further to say. I think I am within
13 the four or five minutes I asked for, and
14 the defendant is ready --

15 THE COURT: If you want to take more
16 time, you do so because as long as it's
17 become a question of repetition, I think
18 you ought to feel free and relaxed, and I
19 say that to all counsel for defendants in
20 making their appeal before this Court because
21 this is perhaps one of the most important
22 days in the life of any defendant. So you
23 feel free to make such appeals as you wish.

24 MR. DRESHER: I will say this, sir.
25 It's a sad day in the life of an attorney

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2 when he has to appear on a sentence of
3 this nature. There is always the haunting
4 feeling that, well, maybe you were remiss
5 in what you did for your client, maybe you
6 were derelict in your representation. It
7 was a pretty close case with the jury, I
8 think, and we always have that in the back
9 of our minds as lawyers. But I have nothing
10 further to say, sir. I'm sure your Honor
11 will give him what you consider a fair
12 sentence, with the future hope of being
13 rehabilitated. We are ready for sentence,
14 sir.

15 THE COURT: Of course, we also have
16 in mind that the Parole Board can take into
17 consideration certain factors and the
18 behavior of the defendant.

19 Albert Mascolo, on your conviction
20 of guilty to two counts of Indictment
21 Number 72 CR 1220, I sentence you to the
22 custody of the Attorney General or his
23 authorized representative, who shall
24 designate the place of confinement, for a
25 period of five years on Count 1 and for a

1
2 period of five years on Count 2, to run
3 concurrently with each other, for a total of
4 five years' imprisonment, pursuant to
5 Section 4208(a)(2) of Title 18 of the
6 United States Code. I hereby specify that
7 you may become eligible for parole at such
8 time as the Board of Parole may determine.

9 I also impose upon you a special
10 parole term of seven years in addition to
11 such term of imprisonment on each count,
12 to run concurrently with each other, for a
13 total of seven years' special parole term.

14 Pursuant to Rule 32(a)(2) of the
15 Federal Rules of Criminal Procedure, I wish
16 to advise you that you have a right to
17 appeal and that if you are unable to pay
18 the cost of such appeal, you may apply to
19 the Court for leave to appeal in forma
20 pauperis.

21 MR. DRESHER: Your Honor, I am sure
22 is aware of the fact that there will be an
23 appeal in this matter, that motions are
24 addressed to the Court and I am going to ask
25 your Honor to show the same consideration

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2 due to Mr. Mascolo as you did to the co-
3 defendant by releasing him on his own
4 recognizance.

5 THE COURT: Do you have any objection?

6 MR. DEL GROSSO: I had objections
7 on both, but --

8 THE COURT: Same ruling.

9 (The hearing was closed.)
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